

produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271 or risk a ruling in the BOC's favor.⁸⁶ We emphasize, however, that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271.

45. With respect to assessing evidence proffered by a BOC applicant and by opponents to a BOC's entry in a section 271 proceeding, neither section 271 nor its legislative history prescribes a particular standard of proof for establishing whether a BOC applicant has satisfied the conditions required for authorization to provide in-region, interLATA services. The standard of proof applicable in most administrative and civil proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard, is the "preponderance of the evidence" standard.⁸⁷ Accordingly, we conclude that the "preponderance of the evidence" standard is the appropriate standard for evaluating a BOC section 271 application.

46. Generally, the preponderance of the evidence standard in civil and administrative actions means the "greater weight of evidence, evidence which is more

⁸⁶ See, e.g., *Hale v. Dep't of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985) ("Proving a *prima facie* case compels the conclusion sought to be proven unless evidence sufficient to rebut the conclusion is produced."). See also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072. We believe that shifting the burden of production once a BOC has presented a *prima facie* case that its application satisfies section 271 is appropriate, because parties opposing a BOC's application have the greatest incentive to produce, and generally have access to, information that would rebut the BOC's case. In addition, absent such a shift in the burden of production, a BOC applicant would be in the untenable position of having to prove a negative (that is, of coming up with, and rebutting, arguments why its application might not satisfy the requirements of section 271). We emphasize, again, that, although the burden of *production* on a particular issue may shift to the opponents of BOC entry, the ultimate burden of *persuasion* never shifts from the BOC to the opponents of BOC entry.

⁸⁷ See, e.g., *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984) ("The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence. . . . The traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard.") (citations omitted); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.) ("The use of the 'preponderance of the evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)."), *cert. denied*, 449 U.S. 834 (1980); *Steadman v. SEC*, 450 U.S. 91 (1981) (reversing prior law to apply the preponderance of the evidence standard to cases under the Administrative Procedures Act (APA) even where a proceeding imposes stringent sanctions); *General Plumbing Corp. v. New York Tel. Co. and MCI*, Memorandum Opinion and Order, 11 FCC Rcd 11799 (1996); see also *Gorgan v. Garner*, 498 U.S. 279, 286 (1991) (because the "preponderance of the evidence" standard results in roughly equal allocation or risks of error between litigants, the Supreme Court presumes that such a standard is applicable in civil actions between private litigants unless particularly important interests or rights are at stake) (citations omitted); Davis & Pierce, II *Administrative Law Treatise* § 10.7, at 171 (3rd Ed. 1994) ("the preponderance of the evidence standard applies to the vast majority of agency actions").

convincing than the evidence which is offered in opposition to it."⁸⁸ As discussed above, the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application. Consequently, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, a BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof. If we find that the evidence is in equipoise after considering the record as a whole, we must reject the BOC's section 271 application, because the BOC will not have satisfied its burden of proof.

47. In our December 6, 1996, Public Notice describing the procedures we would follow in processing section 271 applications, we required each application to "conform to the Commission's general rules relating to applications," and to include an "affidavit signed by an officer or duly authorized employee certifying that all information supplied in the application is true and accurate."⁸⁹ We did not, however, direct parties commenting on a section 271 application to include such an affidavit or verified statement in support of the factual assertions in their comments. While our *December 6 Public Notice* did not require parties that comment on section 271 applications to certify the accuracy of the factual assertions in their comments, we will consider the lack of such a certification in assessing the probative value of their comments. Thus, we will attach greater weight to comments and pleadings supported by an affidavit or sworn statement than we will to an unsupported contrary pleading.

48. On July 7, 1997, Ameritech filed a motion to strike in its entirety the opposition of Brooks Fiber Communications of Michigan to Ameritech's application, on the ground that Brooks Fiber's opposition did not include an affidavit or verified statement certifying the accuracy of the factual assertions in its opposition.⁹⁰ Ameritech argues that the Commission should strike Brooks Fiber's opposition in its entirety, because "Brooks'

⁸⁸ *Hale v. Dep't of Transp.*, 772 F.2d at 885; *St. Paul Fire and Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). See, e.g., 5 C.F.R. § 1201.56 (1997) ("*Preponderance of the evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."). See also 2 Kenneth S. Broun et al., *McCormick on Evidence* § 339, at 439 (John W. Strong ed., 4th ed. 1992) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [finder of fact] to find that the existence of the contested fact is more probable than its nonexistence."); 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5122, at 557-58 (1977) ("the normal burden of proof in a civil case is measured by a 'preponderance of the evidence.' In effect, this means that if the [finder of fact] cannot make up its . . . mind, it should find against the party with the burden of proof.") (citations omitted).

⁸⁹ *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19709-10 (1996) (*December 6th Public Notice*).

⁹⁰ Ameritech Michigan's Motion to Strike the Opposition of Brooks Fiber Communications of Michigan to Ameritech's Application (filed July 7, 1997) (Ameritech Motion to Strike).

unsupported factual assertions are inextricably intertwined with, and indeed form the basis for, each of the legal arguments in the Opposition."⁹¹ Because we believe that the failure by a party to certify the accuracy of the factual assertions contained in its comments goes to the weight, and not the admissibility, of its comments, we decline to grant Ameritech's motion. In any event, we note that, on August 4, 1997, Brooks Fiber filed an affidavit verifying the accuracy of the facts contained in the comments, reply comments, and *ex parte* communications submitted by Brooks Fiber in this docket.⁹²

B. Compliance with Requirement that Application Be Complete When Filed

1. Weight Accorded to New Factual Evidence

49. In our *December 6th Public Notice* announcing procedures governing BOC section 271 applications, we unequivocally stated that "[w]e expect that a section 271 application, *as originally filed*, will include *all of the factual evidence* on which the applicant would have the Commission rely in making its findings thereon."⁹³ We affirmed this requirement in our *Ameritech February 7th Order* where we recognized that, "[b]ecause of the 90-day statutory review period, the section 271 review process is keenly dependent on . . . an applicant's submission of a complete application at the commencement of a section 271 proceeding."⁹⁴

50. In this proceeding, Ameritech submitted over 2,200 pages of reply comments (including supporting documentation), portions of which several parties challenged in two motions to strike.⁹⁵ These parties contend that Ameritech has presented material new information that should not be considered by the Commission in making its decision. In light of these disputes, we find it necessary once again to emphasize the requirement that a BOC's section 271 application must be complete on the day it is filed. As AT&T asserts, this "is the only workable rule given the unique scheme of accelerated and consultative agency review

⁹¹ *Id.* at 4.

⁹² Letter of John C. Shapleigh, Executive Vice President, Brooks Fiber Communications, to William F. Caton, Acting Secretary, Federal Communications Commission, Attachment D (Affidavit of Martin W. Clift, Jr., on Behalf of Brooks Fiber Communications of Michigan, Inc.) (August 4, 1997).

⁹³ *December 6th Public Notice*, 11 FCC Rcd at 19709 (emphasis added).

⁹⁴ *Ameritech February 7th Order*, 12 FCC Rcd at 3320.

⁹⁵ See Motion of AT&T to Strike Portions of Ameritech's Reply Comments and Reply Affidavits in Support of its Section 271 Application for Michigan, filed July 15, 1997 (AT&T Motion to Strike); Joint Motion of MCI, WorldCom, and ALTS to Strike Ameritech's Reply to the Extent it Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process, filed July 16, 1997 (Joint Motion to Strike).

that Congress crafted for [s]ection 271."⁹⁶ We stress that an applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. This includes the submission, on reply, of factual evidence gathered after the initial filing. If a BOC applicant chooses to submit such evidence, we reserve the discretion either to restart the 90-day clock, as was done with respect to Ameritech's initial, January 2, 1997, application,⁹⁷ or to accord the new evidence no weight in making our determination.

51. Under our procedures governing BOC applications, all participants in a proceeding, including the BOC applicant itself, may file a reply to any comment made by any other participant. We explicitly stated in our *December 6th Public Notice*, however, that reply comments "may not raise new arguments that are not directly responsive to arguments other participants have raised"⁹⁸ That same principle applies to the submission of new factual information by the BOC after the filing of its application: a BOC may not submit new evidence after its application has been filed that is not directly responsive to evidence or arguments raised by other parties. The right of the applicant to submit new factual information after its application has been filed is narrowly circumscribed. A BOC may submit new factual evidence if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, *provided the evidence covers only the period placed in dispute by commenters and in no event post-dates the filing of those comments.*⁹⁹ That is, a BOC is entitled to challenge a commenter's version of certain events by presenting its own version of those same events. In an effort to meet its burden of proof, therefore, a BOC may submit new facts relating to a particular incident that contradict a commenter's version of that incident. A BOC's ability to submit new information, however, is limited to this circumstance. Because parties are required to file comments within 20 days after a BOC files its section 271 application, commenters will not have placed at issue facts which post-date day 20 of the application. For this reason, under no circumstance is a BOC permitted to counter any arguments with new factual evidence *post-dating* the filing of comments. As indicated, such evidence, if submitted, will not receive any weight. For example, in the instant order we

⁹⁶ AT&T Motion to Strike at 9.

⁹⁷ See *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (rel. Jan. 17, 1997). See also *supra* at paras. 24-27.

⁹⁸ *December 6th Public Notice*, 11 FCC Rcd at 19711.

⁹⁹ See Joint Motion to Strike at 10 (recognizing that Ameritech has a right to submit new evidence in reply to respond to evidence of post-application matters submitted by interested parties in their comments and stating that Ameritech should not be barred from submitting such information in its reply); AT&T Motion to Strike at 13 (acknowledging that, to the extent comments filed on day 20 contain new factual evidence that occurred between day 1 and day 20, the BOC may reply to it with "a focused, fact-specific response" that does not go beyond day 20).

give no weight to the May interconnection data that Ameritech filed on reply because it reflects performance for a period after Ameritech submitted its application and no party submitted May interconnection data or otherwise raised arguments concerning Ameritech's compliance with this checklist item during that month.¹⁰⁰

52. We hold that it is appropriate to accord new factual evidence no weight for several reasons. First, as we have stated before, we find that allowing a BOC to supplement its application with new information at any time during the proceeding would be "unfair to interested third parties seeking to comment on a fixed record triggered by the date that a section 271 application is filed."¹⁰¹ When new factual information is filed either in the applicant's reply comments, or after the reply period, other parties have no opportunity to comment on the veracity of such information except through the submission of *ex partes*. Even if we were to waive the current 20-page limit on written *ex parte* submissions,¹⁰² "reliance on [*ex partes*] to 'update the record' would simply exacerbate the problem, since each attempt by commenting parties to correct [alleged] BOC misstatements or oversights would unquestionably prompt the BOCs to file new *ex partes* themselves."¹⁰³ In addition, we agree with MCI that allowing BOCs to rely on new factual evidence to demonstrate compliance with the requirements of section 271 may "encourage [them] to game the system by withholding evidence until the reply round of comments, when they are immune from attack."¹⁰⁴

53. Second, we find that permitting the BOC applicant to submit new information, particularly at the reply stage, would "impair the ability of the state commission and of the Attorney General to meet their respective statutory consultative obligations."¹⁰⁵ As we recognized in the *Ameritech February 7th Order*, it is essential that these parties have the ability to evaluate a full and complete record. Under our procedures for BOC applications,

¹⁰⁰ See *infra* para. 237.

¹⁰¹ *Ameritech February 7th Order*, 12 FCC Rcd at 3321. For example, AT&T states that, given the opportunity, it "could readily demonstrate that Ameritech's new June-based record is every bit as misleading and inadequate as the one it submitted in May." AT&T Motion to Strike at 3.

¹⁰² See *December 6th Public Notice* at 19711-12.

¹⁰³ AT&T Motion to Strike at 12-13.

¹⁰⁴ Joint Motion to Strike at 10.

¹⁰⁵ *Ameritech February 7th Order*, 12 FCC Rcd at 3320-21; see AT&T Motion to Strike at 12; Joint Motion to Strike at 8.

neither the state commission nor the Department of Justice would have the opportunity to comment upon new factual evidence submitted in the BOC's reply on day 45.¹⁰⁶

54. Third, we find that during a 90-day review period, the Commission has neither the time nor the resources to evaluate a record that is constantly evolving.¹⁰⁷ We examine the comments of the parties as part of our assessment of the credibility and accuracy of the BOC's assertions. An applicant's submission of new evidence after the filing of its application, particularly when such information is submitted in reply comments, impairs the Commission's ability to evaluate the credibility of such new information.¹⁰⁸ As we observed in the *Ameritech February 7th Order*, allowing a BOC applicant continually to file new evidence would undermine this Commission's ability to render a decision within the 90-day statutory period.¹⁰⁹ Given these concerns, we find that using our discretion to accord BOC submissions of new factual evidence no weight will ensure that our proceedings are conducted in "such manner as will best conduce to the proper dispatch of business and to the ends of justice."¹¹⁰

55. On a separate but related matter, we find that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof.¹¹¹ In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Significantly, the timing of a section 271 filing is one that is

¹⁰⁶ See AT&T Motion to Strike at 11; Joint Motion to Strike at 8.

¹⁰⁷ Joint Motion to Strike at 5 (asserting that an application must be complete when filed in order to allow interested parties and governmental entities to aim at a stationary target).

¹⁰⁸ Further, as demonstrated by the instant proceeding, such a submission also leads to the filing of motions to strike that generate additional pleadings and consume agency resources.

¹⁰⁹ See *Ameritech February 7th Order*, 12 FCC Rcd at 3321; Joint Motion to Strike at 8. Similarly, as Ameritech itself recognizes in the context of unsupported factual assertions, "the need to ascertain the reliability of [unverified allegations] would undermine [the] Commission's ability to render a decision within [the] 90-day period." Ameritech Motion to Strike at 4.

¹¹⁰ 47 U.S.C. § 154(j).

¹¹¹ We note, however, that section 271(d)(3) requires that the BOC demonstrate that its "requested [in-region, interLATA] authorization *will be carried out* in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3) (emphasis added). As explained below, this is, in essence, a predictive judgment regarding the future behavior of the BOC. In making this determination, we will look to past and present behavior of the BOC as the best indicator of whether the BOC will carry out the requested authorization in compliance with the requirements of section 272. See *infra* Section VII.A.

solely within the applicant's control. We therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 and submits with its application sufficient factual evidence to demonstrate such compliance. Evidence demonstrating that a BOC *intends to come into compliance* with the requirements of section 271 by day 90 is insufficient. If, after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance with the requirements of section 271, then the BOC's application is premature and should be withdrawn.¹¹² Thus, for instance, we conclude in this order that we cannot find that Ameritech presently provides nondiscriminatory access to its 911 database based on the fact that it "is developing" a service to allow competitors equivalent access.¹¹³

56. We find that enforcing our requirement that all BOC applications be factually complete when filed is fair and does not pose an undue hardship to the BOC.¹¹⁴ We note that our procedural requirements governing section 271 applications have been in effect since December 6, 1996. Moreover, they were recently enforced against Ameritech in February 1997.¹¹⁵ Thus, there can be no doubt that Ameritech and other BOCs have had sufficient notice of the Commission's procedural requirements and our intention of enforcing them.¹¹⁶ Further, if a BOC elects to withdraw its application during the 90-day review period, we would consider this, as we have done in the past, to be a withdrawal without prejudice.¹¹⁷ In this instance, barring the imposition of any conditions on refiling,¹¹⁸ we would expect Ameritech to refile its application once it has a factual basis to demonstrate fully in its initial

¹¹² See Joint Motion to Strike at 5; AT&T Motion to Strike at 15.

¹¹³ See *infra* para. 269. Although promises of future performance cannot demonstrate present compliance, we find that promises by a BOC applicant that it will continue to be in compliance with the requirements of section 271 once entry is authorized, particularly promises to take various steps to ensure its continued cooperation with new entrants, would be an important consideration in our determination whether the BOC's local market will remain open to competition once it has received interLATA authority. Such promises, therefore, will be a factor we will consider in our public interest analysis. See *infra* para. 399.

¹¹⁴ See Joint Motion to Strike at 5.

¹¹⁵ In June 1997, we reiterated our requirement in the *SBC Oklahoma Order* where we stated that, "[g]iven the expedited time in which the Commission must review these [section 271] applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application." *SBC Oklahoma Order* at para. 60.

¹¹⁶ See Joint Motion to Strike at 4-5, 10; AT&T Motion to Strike at 13.

¹¹⁷ See *Ameritech Termination Order*, 12 FCC Rcd 2088.

¹¹⁸ Should a BOC withdraw its section 271 application at any time during the 90-day statutory period, we reserve our discretion to impose conditions governing when a BOC may refile its application. See 47 U.S.C. § 154(j).

filing that it complies with the requirements of section 271.¹¹⁹ Once it has refiled, Ameritech will then obtain a determination on its application in the next 90 days that is based on a full and complete submission. Ameritech, therefore, is "not at the mercy of either an indefinite agency proceeding or a dismissal with prejudice."¹²⁰

57. By retaining the discretion to accord new factual evidence no weight, we do not suggest that Ameritech should have included all 2,200 pages of its reply submission in its initial application. We agree with Ameritech's contention that it is not obligated in its initial application to anticipate and address every argument and allegation its opponents might make in their comments.¹²¹ Indeed, we are mindful of the page limits that we have placed on an applicant's brief in support.¹²² At the same time, however, we find that a BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. As mentioned above, it is our expectation that state commissions will initiate proceedings to evaluate a BOC's compliance with the requirements of section 271 prior to the BOC filing a section 271 application with the Commission.¹²³ In those proceedings, certain factual disputes will come to light, and certain concerns will likely be expressed by the state commission. Although we expect that a BOC will take appropriate efforts to settle any factual disputes and rectify concerns expressed by the state commission prior to its section 271 filing, there are likely to be outstanding areas of contention. Through these state proceedings, therefore, BOCs are able to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.¹²⁴

58. Similarly, if a formal complaint against a BOC is pending before us or the state commission, the BOC should be able to anticipate that the subject matter of the complaint will be at issue in the section 271 proceeding and should, therefore, include in its initial filing before the Commission facts and arguments addressing this issue. For example, because Ameritech's 911 service is the subject of a formal complaint before the Michigan

¹¹⁹ See *SBC Oklahoma Order* at para. 66 (noting that SBC may refile its section 271 application in the future once it has demonstrated that it satisfies the requirements of section 271(c)(1)).

¹²⁰ AT&T Motion to Strike at 15.

¹²¹ See Ameritech Michigan's Response to Motions to Strike at 3-5 (filed July 30, 1996) (Ameritech Response to Motions to Strike).

¹²² *December 6th Public Notice*, 11 FCC Rcd at 19709 (limiting the BOC's brief in support to 100 pages).

¹²³ See *supra* para. 30. For example, as we note above, the Michigan Commission established Michigan Case No. U-11104 on June 5, 1996, to receive information relating to Ameritech's compliance with section 271(c). See *supra* note 54.

¹²⁴ Indeed, we note that the comments filed before the state commission may well be the same or similar to the comments filed before the Commission.

Commission, Ameritech, at the very least, should have acknowledged in its initial application that it has experienced problems in its 911 database and anticipated the arguments that commenters raised regarding Ameritech's provision of 911 service. We therefore disagree with Ameritech that it would have to be "marvelously -- indeed, perfectly -- clairvoyant" to foresee certain comments and address them in its initial application.¹²⁵

59. Because we will exercise our discretion in determining whether to accord new factual evidence any weight, we deny AT&T's motion and the Joint Motion of MCI, MFS WorldCom, and ALTS to strike from the record the portions of Ameritech's reply that contain new evidence. Because we deny the motions to strike, we do not address Ameritech's argument that these motions are improper because they lack specificity. We also deny MCI's motion to restart the 90-day clock because we find that such a remedy is not necessary in this case to preserve the integrity of the section 271 process.

2. Obligation To Present Evidence and Arguments Clearly

60. When a BOC presents factual evidence and arguments in support of its application for in-region, interLATA entry, we expect that such evidence will be clearly described and arguments will be clearly stated in its legal brief with appropriate references to supporting affidavits. Although we are mindful of the page limitations on the BOC applicant, we nevertheless find that evidence and arguments, at a minimum, should be referenced in the BOC's legal briefs and not buried in affidavits and other supporting materials. We note that Ameritech's initial application totalled over 10,000 pages and, as noted above, its reply comments totalled over 2,200 pages. As the United States Court of Appeals for the District of Columbia Circuit recently found, "[t]he Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner."¹²⁶ The petitioner has "the 'burden of clarifying its position' before the agency."¹²⁷ We find this to be particularly true in the context of section 271 proceedings in which the Commission is operating under a 90-day statutory deadline and the BOC applicant bears the burden of proof. Moreover, the obligation to present evidence and arguments in a clear and concise manner also extends to commenting parties. The Commission simply has neither the time nor the resources to search through thousands of pages to discern the positions of the parties, particularly that of the applicant. For example, although there was no indication in Ameritech's reply brief that it intended to respond to the allegations made in the record with respect to its provision of intraLATA toll service, careful examination of Ameritech's

¹²⁵ Ameritech's Response to Motions to Strike at 5.

¹²⁶ *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

¹²⁷ See *id.* at 279-80 (quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989)).

supporting documentation revealed five pages of arguments on this issue in one of Ameritech's 28 reply affidavits.

61. In addition, we conclude that, when a BOC submits factual evidence in support of its application, it bears the burden of ensuring that the significance of the evidence is readily apparent. During the short 90-day review period, the Commission has no time to review voluminous data whose relevance is not immediately apparent but can only be understood after protracted analysis. For example, in the instant application, although Ameritech submits performance data on trunk blockage that appears on its face to be Michigan-specific, further investigation revealed that the data was actually calculated on a region-wide basis.¹²⁸ As stated above, a BOC has the burden of demonstrating by a preponderance of the evidence that it is in compliance with the requirements of section 271. A BOC cannot meet its burden of proof without clearly establishing the relevance and meaning of the data it submits to rebut arguments made in the record.

V. COMPLIANCE WITH SECTION 271(c)(1)(A)

A. Introduction

62. In order for the Commission to approve a BOC's application to provide in-region interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) or 271(c)(1)(B).¹²⁹ In this instance, Ameritech contends that "it has met all of the requirements of Section 271(c)(1)(A) of the Act."¹³⁰ Section 271(c)(1)(A) provides:

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.--A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section

¹²⁸ See, e.g., *infra* note 615.

¹²⁹ 47 U.S.C. § 271(d)(3)(A).

¹³⁰ Ameritech Application at 8. Section 271(c)(1)(B) of the Act allows a BOC to seek entry under Track B if "no such provider has requested the access and interconnection described in [section 271(c)(1)(A)]" and the BOC's statement of generally available terms and conditions has been approved or permitted to take effect by the applicable state regulatory commission. In this instance, Ameritech has not sought entry under Track B, claiming instead that competitors have requested the access and interconnection described in section 271(c)(1)(A). Ameritech Application at 7; see also *SBC Oklahoma Order* at para. 27 (concluding that if a BOC has received "a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A)," the BOC is barred from proceeding under Track B); Michigan Commission Consultation at 3 n.5 (indicating that the Michigan Commission rejected Ameritech's statement of generally available terms and conditions on the ground that Ameritech does not qualify for Track B because competitors had made timely requests for access and interconnection).

252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.¹³¹

63. According to Ameritech, its implemented agreements with Brooks Fiber, MFS WorldCom, and TCG satisfy "all of the requirements of subsection 271(c)(1)(A)."¹³² Because Ameritech relies exclusively on Brooks Fiber, MFS WorldCom, and TCG for purposes of satisfying section 271(c)(1)(A), we will focus in this section only on the record evidence concerning these carriers' activities in Michigan. We conclude below that Ameritech has demonstrated that it complies with section 271(c)(1)(A).

B. Factual Summary of Competing Providers' Operations in Michigan

64. For purposes of demonstrating compliance with section 271(c)(1)(A), Ameritech relies on its negotiated interconnection agreements with Brooks Fiber and MFS WorldCom, and its interconnection agreement with TCG that was negotiated in part and arbitrated in part.¹³³ The Michigan Commission, pursuant to section 252, approved Ameritech's agreement with Brooks Fiber on November 26, 1996; with MFS WorldCom on December 20, 1996; and with TCG on November 1, 1996.¹³⁴

65. Brooks Fiber currently serves both business and residential customers through either: (1) fiber optic rings, which are connected to its switches; or (2) unbundled loops

¹³¹ 47 U.S.C. § 271(c)(1)(A).

¹³² Ameritech Application at 8-14.

¹³³ Ameritech Application at 7; Michigan Commission Consultation at 5.

¹³⁴ Ameritech Application at 5; *see also id.*, Vol. 1.3, Interconnection Agreement between Brooks Fiber Communications of Michigan, Inc. and Ameritech Michigan (Brooks Fiber Interconnection Agreement); *id.*, Vol. 1.4, Interconnection Agreement between MFS Intelenet of Michigan, Inc. and Ameritech Michigan (MFS WorldCom Interconnection Agreement); *id.*, Vol. 1.6, Interconnection Agreement between TCG Detroit and Ameritech Michigan (TCG Interconnection Agreement).

obtained from Ameritech, which are connected to Brooks Fiber's switches.¹³⁵ Brooks Fiber does not provide service through resale of Ameritech's telecommunications services.¹³⁶ Brooks Fiber's major area of operation is in the Grand Rapids area, and it has also recently begun offering service in a few other Michigan cities.¹³⁷ According to Brooks Fiber, as of June 6, 1997, it had 21,786 access lines in service in Grand Rapids -- 15,876 business lines and 5910 residential lines.¹³⁸ Brooks Fiber states that it serves 61 percent of its business lines, *i.e.*, approximately 9864 lines, and 90 percent of its residential lines, *i.e.*, approximately 5319 lines, through its switch along with the purchase of unbundled loops from Ameritech.¹³⁹ The other lines -- approximately 6192 business and 591 residential -- are served exclusively through facilities constructed by Brooks Fiber.¹⁴⁰

66. TCG serves business customers in the Detroit metropolitan area through either: (1) its switch and fiber optic network; or (2) dedicated DS1 and DS3 lines purchased under Ameritech's interstate access tariff, which are connected to TCG's switch in the Detroit area.¹⁴¹ TCG is not offering service through the resale of Ameritech's telecommunications services.¹⁴² According to Ameritech, TCG serves 5280 business lines.¹⁴³

¹³⁵ Ameritech Application at 10, and Vol. 2.3, Edwards Aff. at 5; Brooks Fiber Comments at 6-7; Brooks Fiber Reply at 4. Ameritech relies on data provided by the competing carriers to estimate the number of lines that each competitor serves. We find the evidence submitted by the competitors to be more reliable information on the actual number of access lines served by those carriers.

¹³⁶ Ameritech Application at 11, and Vol. 2.3, Edwards Aff. at 5; Brooks Fiber Comments at 6-7; Brooks Fiber Reply Comments at 4.

¹³⁷ Brooks Fiber states that is serving customers in Grand Rapids, Holland, and Lansing. Brooks Fiber Comments at 1 n.2, and 6 n.18. Ameritech claims that Brooks Fiber is serving customers in those cities, as well as in Traverse City and Ann Arbor. Ameritech Application at 10.

¹³⁸ Brooks Fiber Comments at 6-7. In its application, Ameritech claims that, as of March 31, 1997, Brooks Fiber served 20,297 access lines. Ameritech Application, Vol. 3.3, Harris and Teece Aff., at 48-49. There are no data in the record on the number of lines that Brooks Fiber serves in other Michigan cities.

¹³⁹ Brooks Fiber Comments at 6-7.

¹⁴⁰ *Id.* Ameritech claims in its application that Brooks Fiber serves 9000 access lines over facilities it has constructed and installed. Ameritech Application, Vol. 3.3, Harris and Teece Aff. at 48-49.

¹⁴¹ Ameritech Application at 11, and Vol. 2.3, Edwards Aff. at 6; TCG Comments at 25-26.

¹⁴² Ameritech Application at 11-12, and Vol. 2.3, Edwards Aff. at 6; TCG Comments at 25-26.

¹⁴³ Ameritech Application at 11, and Vol. 2.3, Edwards Aff. at 6. TCG neither provides record evidence on the number of access lines it serves, nor disputes Ameritech's estimates. We encourage competing LECs, in future section 271 proceedings, to provide to the Commission information about their operations in the relevant state, including the number of access lines served. For those carriers that are concerned about disclosing what

67. MFS WorldCom serves business customers in the Detroit metropolitan area through the following three methods: (1) its switch and fiber optic ring; (2) unbundled loops obtained from Ameritech, which are connected to MFS WorldCom's switch; and (3) resale of Ameritech's telecommunications services.¹⁴⁴ Ameritech claims that MFS WorldCom serves 26,400 business lines exclusively through facilities constructed by MFS WorldCom and 2145 non-Centrex business lines through resale.¹⁴⁵

68. MFS WorldCom contends that Ameritech used unrealistic assumptions to estimate the number of access lines served by MFS WorldCom, and as a result, vastly overstated the number of lines.¹⁴⁶ MFS WorldCom claims that it actually serves 79 percent of its business lines through resale of Ameritech's services, 2.2 percent of its business lines exclusively through MFS facilities, and the remaining lines -- approximately 19 percent -- through its switching facilities and the purchase of unbundled loops from Ameritech.¹⁴⁷ In reply, Ameritech does not contest MFS WorldCom's statements, contending instead that MFS WorldCom has "purchased or constructed . . . local switching facilities, fiber optic networks, and thousands of loops and trunk lines over which [it] predominantly or exclusively provide[s] local service."¹⁴⁸

C. Ameritech's Compliance with Section 271(c)(1)(A)

69. Ameritech claims that it has "met the requirements of Section 271(c)(1) by entering into interconnection agreements with MFS WorldCom, TCG, and Brooks Fiber, all of which have been approved by the [Michigan Commission] under Section 252(e) of the Act."¹⁴⁹ Moreover, Ameritech maintains that "[t]hese agreements satisfy the requirements of Section 271(c)(1)(A) that they be with competing providers of telephone exchange service, offered

they consider to be confidential information, we have established procedures for the submission of confidential information. See *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket No. 97-137, Protective Order, DA 97-1073 (rel. May 21, 1997) (attachment to *May 21st Public Notice*). In fact, we note that MFS WorldCom submitted data on a proprietary basis regarding the number of access lines it serves.

¹⁴⁴ Ameritech Application, Vol. 2.3, Edwards Aff. at 5-6; MFS WorldCom Comments at 4.

¹⁴⁵ Ameritech Application at 11-12.

¹⁴⁶ MFS WorldCom Comments at 4. MFS WorldCom, in its comments, submitted data on a proprietary basis regarding the actual number of access lines it serves through each method.

¹⁴⁷ *Id.*

¹⁴⁸ Ameritech Reply Comments at 2.

¹⁴⁹ Ameritech Application at 7.

exclusively or predominantly over their own facilities, to residential and business customers."¹⁵⁰

70. In response, numerous parties argue that Ameritech has failed to satisfy various aspects of the section 271(c)(1)(A) requirement. In particular, these parties contest: (1) whether Ameritech has signed one or more binding agreements that have been approved under section 252; (2) whether Ameritech is providing access and interconnection to unaffiliated competing providers of telephone exchange service; (3) whether there are unaffiliated competing providers of telephone exchange service *to residential and business customers*; and (4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. We address these issues separately in order to determine whether Ameritech meets section 271(c)(1)(A).

1. Existence of One or More Binding Agreements That Have Been Approved Under Section 252

71. Section 271(c)(1)(A) requires Ameritech to have entered into binding interconnection agreements that have been approved by the Michigan Commission. Ameritech contends, and the Michigan Commission concurs, that Ameritech meets this requirement through its agreements with Brooks Fiber, MFS WorldCom, and TCG.¹⁵¹ Only one party disputes Ameritech's claim. Brooks Fiber argues that Ameritech's interconnection agreements cannot be considered binding agreements, because: (1) the agreements contain interim prices rather than final cost-based prices;¹⁵² and (2) the agreements do not contain all of the elements necessary to satisfy the competitive checklist, but instead rely on a "most favored nation"

¹⁵⁰ *Id.*

¹⁵¹ Ameritech Application at 8-9; Michigan Commission Consultation at 3-6.

¹⁵² Brooks Fiber Comments at 10-11; Brooks Fiber Reply Comments at 3-4. At the time Ameritech filed its application and at the time Brooks Fiber filed its comments, the Michigan Commission had not yet issued a decision in its rate proceeding. See Michigan Commission Consultation at 8-9. On July 14, 1997, the Michigan Commission issued a decision in this rate proceeding and adopted a cost methodology for determining rates. See *In the matter, on the Commission's own motion, to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services for Ameritech Michigan*, Michigan Public Service Commission Case No. U-11280, Opinion and Order (rel. July 14, 1997) (*Michigan Rate Proceeding*). On July 24, 1997, Ameritech submitted rates based on the Michigan Commission's order. Letter from Nancy M. Short, Director, Public Policy, Ameritech, to William J. Celio, Director, Communications Division, Michigan Public Service Commission (July 24, 1997).

provision to incorporate missing elements into the agreements.¹⁵³ Brooks Fiber maintains that it has not yet exercised its rights under this provision.¹⁵⁴ In addition, Brooks Fiber argues that, because competing carriers have experienced difficulties using the "most-favored nation" clauses in their interconnection agreements, there is "significant doubt" as to whether these clauses actually provide competing carriers with access to checklist items in other agreements.¹⁵⁵

72. We conclude that Ameritech's agreements with Brooks Fiber, MFS WorldCom, and TCG that have been approved by the Michigan Commission pursuant to section 252 are "binding agreements" within the meaning of section 271(c)(1)(A). These agreements specify the rates, terms, and conditions under which Ameritech will provide access and interconnection to its network facilities.¹⁵⁶ Moreover, according to the uncontroverted record in this proceeding, Brooks Fiber, MFS WorldCom, and TCG are currently receiving access and interconnection to Ameritech's network facilities pursuant to these agreements.¹⁵⁷ We reject Brooks Fiber's contention that Ameritech cannot be found to have entered into a binding agreement with competing providers until the agreements include final cost-based prices and all items of the competitive checklist. The agreements define the obligations of each party and the terms of the relationship as they currently exist. Although the rates, terms, and conditions in the agreements may be modified through an action of the Michigan Commission, or by action of Brooks Fiber, MFS WorldCom, or TCG, if they exercise their rights under the "most-favored nation" clauses, that does not affect the binding nature of the current agreements or provide a reason for nonperformance of a party's obligation under an agreement.¹⁵⁸ Moreover, we find nothing in section 271(c)(1)(A) that requires each

¹⁵³ In this instance, the parties to each interconnection agreement have negotiated "most-favored nation" clauses that, according to Ameritech, readily allows competing LECs to modify their agreements with Ameritech by incorporating provisions from other approved interconnection agreements. See Ameritech Application at 16-17.

¹⁵⁴ Brooks Fiber Comments at 10-11.

¹⁵⁵ Brooks Fiber Reply Comments at 3-4.

¹⁵⁶ See Ameritech Application, Vol. 1.3, Brooks Fiber Interconnection Agreement, Vol. 1.4, MFS WorldCom Interconnection Agreement, and Vol.1.6, TCG Interconnection Agreement.

¹⁵⁷ See Michigan Commission Consultation at 5-6.

¹⁵⁸ The Eighth Circuit recently concluded that interpreting section 252(i) to allow competing carriers with existing interconnection agreements to incorporate individual provisions from other interconnection agreements would mean that "negotiated agreements will, in reality, not be binding, because . . . an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers." *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 1997 WL 403401, at *11 (8th Cir., July 18, 1997). In Ameritech's case, the parties have negotiated "most-favored nation" provisions that, according to Ameritech, allow a competing carrier to seek a modification to the agreement in

interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A). We therefore agree with Ameritech that its interconnection agreements with Brooks Fiber, MFS WorldCom, and TCG are "binding agreements."

73. In addition, although section 271(c)(1)(A) does not require that each agreement contain all elements of the competitive checklist and permanent cost-based prices to be "binding" agreements, we note that our decision here does not resolve issues raised in the record as to the effect of the interim nature of certain prices in the agreements or Ameritech's reliance on "most-favored nation" provisions on our evaluation of whether Ameritech has met the other requirements of section 271.¹⁵⁹ To the extent Brooks Fiber is contending that Ameritech has not fully implemented the competitive checklist in section 271(c)(2)(B), we address these concerns in our discussion below of Ameritech's compliance with the competitive checklist.

2. Provision of Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service

74. We next consider Ameritech's assertions that it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that those carriers are "unaffiliated competing providers of telephone exchange service."¹⁶⁰ Several parties contest this assertion, arguing that Brooks Fiber, MFS WorldCom, and TCG cannot be considered to be "competing providers" as required by section 271(c)(1)(A), because they serve a small number of the access lines in Michigan and because the majority of customers in Michigan do not have a choice for local exchange service.¹⁶¹ Ameritech responds that section 271(c)(1)(A)

order to incorporate more advantageous provisions from other agreements. See Ameritech Application at 16-17. We believe that the Eighth Circuit's determination with respect to section 252(i) does not foreclose the rights of parties to negotiate freely a binding agreement that contains a contractual term, such as a "most-favored nation" clause, that enables those parties to modify the terms of the agreement.

¹⁵⁹ See *infra* note 247.

¹⁶⁰ Ameritech Application at 8-9.

¹⁶¹ ALTS Comments at 26-27; AT&T Comments at 32-34; CompTel Comments at 29-30; CompTel Reply Comments at 8-9; MCTA Comments at 17-18; NCTA Reply Comments at 9-10; Ohio Consumers' Counsel Comments at 5-6; Ohio Consumers' Counsel Reply Comments at 4; TRA Comments at 11-12; TRA Reply Comments at 14-15; MFS WorldCom Reply Comments at 4-5. At the end of 1995, there were approximately 6.2 million access lines in Michigan, including over 5.5 million switched access lines. Report, *Statistics of Communications Common Carriers*, Federal Communications Commission, 1995/1996 Edition, at Table 2.5 (1996) (*Common Carrier Statistics*). Ameritech served approximately 5.5 million of the total access lines, including over 4.8 million switched access lines, with the vast majority of the remaining lines being served by other incumbent local exchange carriers in separate areas, rather than competitors in Ameritech's service area. *Id.* at Table 2.10; see also Department of Justice Evaluation, Appendix B, at B-1. For a summary of the number

does not require that a competing carrier "be a certain size, serve any particular number of customers, or cover a certain geographic area."¹⁶² Moreover, Ameritech argues that, even if section 271(c)(1)(A) requires a specified level of local competition, Ameritech has met the requirement, because Brooks Fiber, MFS WorldCom, and TCG compete against Ameritech in Detroit and Grand Rapids -- the two most populous local markets in Michigan.¹⁶³

75. We determined in the *SBC Oklahoma Order* that "the use of the term 'competing provider[]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC."¹⁶⁴ We further concluded that "the existence of [a carrier's] effective local exchange tariff is not sufficient to satisfy section 271(c)(1)(A)."¹⁶⁵ Rather, we determined that, at a minimum, a carrier must actually be in the market and operational (*i.e.*, accepting requests for service and providing such service for a fee), although we did not address whether a new entrant must meet additional criteria to be considered a "competing provider" under section 271(c)(1)(A).¹⁶⁶ Specifically, we did not determine whether a competing LEC must attain a certain size or geographic scope.¹⁶⁷

76. We do not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider.¹⁶⁸ The plain language of that provision does not mandate any such level, and therefore, does not support imposing a geographic scope requirement. Consistent with this interpretation, we note that the House Commerce Committee's Report indicated that "[t]he Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service *somewhere in the State* prior to granting a BOC's petition for entry into long distance."¹⁶⁹

of lines served by Brooks Fiber, MFS WorldCom, and TCG, see *supra* paras. 65-67.

¹⁶² Ameritech Reply Comments at 2 n.3; see also Competition Policy Institute Comments at 3.

¹⁶³ Ameritech Reply Comments at 2 n.3.

¹⁶⁴ *SBC Oklahoma Order* at para. 14.

¹⁶⁵ *Id.* at para. 18.

¹⁶⁶ *Id.* at paras. 14, 17.

¹⁶⁷ *Id.* at para. 14.

¹⁶⁸ Information on the level of geographic penetration is relevant to our assessment of whether "the requested authorization is consistent with the public interest." See *infra* para. 391; 47 U.S.C. § 271(d)(3)(C). We therefore expect parties to provide this information in future section 271 applications.

¹⁶⁹ House Report at 77 (*emphasis added*). The House Report further explains why the Commerce Committee did not believe a geographic scope requirement is necessary:

77. We also do not read section 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a "competing provider." Consistent with this interpretation, we note that the Senate and House each rejected language that would have imposed such a requirement in section 271(c)(1)(A).¹⁷⁰ Nevertheless, we recognize that there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a "competing provider."¹⁷¹

78. In this Order, we need not and do not reach the question of whether a carrier that is serving a *de minimis* number of access lines is a "competing provider" under section 271(c)(1)(A). In this instance, Ameritech relies on three operational carriers, each of which is serving thousands of access lines in its service area.¹⁷² Because Brooks Fiber, MFS WorldCom, and TCG are each accepting requests for telephone exchange service and serving more than a *de minimis* number of end-users for a fee in their respective service areas, we find that each of these carriers is an actual commercial alternative to the BOC. We therefore agree with Ameritech that it is providing access and interconnection to Brooks Fiber, MFS

The requirement of an operational competitor is crucial because . . . whatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the "agreement" and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout a State, with an absolute minimum of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the "openness and accessibility" requirements have been met.

Id. We note that the section 271(c)(1)(A) requirement "comes virtually verbatim from the House amendment." Joint Explanatory Statement at 147.

¹⁷⁰ The Senate rejected an amendment that would have required the presence of competing carriers "capable of providing a *substantial* number of business and residential customers with telephone exchange or exchange access service" prior to in-region interLATA entry by the BOC. 141 Cong. Rec. S8319-26 (daily ed. June 14, 1995) (emphasis added). The House also rejected a scale and scope requirement for local competition in section 245(a)(2)(A) of its bill, which became section 271(c)(1)(A). The bill that was reported out of the House Commerce Committee required the presence of "an unaffiliated competing provider of telephone exchange service that is comparable in price, features, and scope" to that offered by the BOC. House Report at 7. When it considered the bill, the House adopted an amendment that eliminated the "comparable in price, features, and scope" language. 141 Cong. Rec. H8444-60 (daily ed. Aug. 4, 1995).

¹⁷¹ Commenters use various terms to describe the number of customers that they contend would be so small that a new entrant could not be considered a "competing provider." See, e.g., CompTel Comments at 29-30 ("*de minimis*"); TRA Comments at 11-12 ("*minuscule*"); NCTA Reply Comments at 9-10 ("*minuscule*"); Ohio Consumers' Counsel Comments at 5-6 ("*token*").

¹⁷² For details on the operations of Brooks Fiber, MFS WorldCom, and TCG in Michigan, see *supra* paras. 65-67.

WorldCom, and TCG, and that these carriers are "competing providers of telephone exchange service."¹⁷³

79. We note that numerous parties also argue that we should consider the state of local competition in Michigan, as a whole, as part of our determination of whether "the requested authorization is consistent with the public interest, convenience, and necessity" under section 271(d)(3)(C).¹⁷⁴ Our decision here interpreting section 271(c)(1)(A) does not preclude us from considering competitive conditions or geographic penetration as part of our inquiry under section 271(d)(3)(C).¹⁷⁵

3. Provision of Telephone Exchange Service to Residential and Business Subscribers

80. Having determined that Ameritech has "binding agreements" under which it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that these carriers are "unaffiliated competing providers," we next consider whether Brooks Fiber, MFS WorldCom, and TCG are providing "telephone exchange service . . . to residential and business subscribers." Ameritech claims that it has "satisfied this requirement because Brooks Fiber, MFS, and TCG are unaffiliated competing providers of telephone exchange services that together serve business and residential customers."¹⁷⁶ ALTS, CompTel, the Department of Justice, TRA, and MFS WorldCom disagree with this statutory interpretation, arguing that neither MFS WorldCom nor TCG can be deemed to satisfy this aspect of section

¹⁷³ As we noted above, Ameritech is providing access and interconnection pursuant to its interconnection agreements. *See supra* para. 72; *see also* Michigan Commission Consultation at 5-6. Several parties contend, however, that Ameritech is not "providing access and interconnection" as required by section 271(c)(1)(A), because competing providers have experienced specific problems with such access and interconnection. *See* Brooks Fiber Comments at 11-12; Michigan Attorney General Comments at 5-6, 9; TCG Comments at 2. Because these arguments concern specific problems experienced by competitors, these parties are, in fact, contending that Ameritech has not "fully implemented the competitive checklist in subsection (c)(2)(B)." *See* 47 U.S.C. § 271(d)(3)(A)(i). Thus, we address these concerns about Ameritech's provision of specific checklist items in our discussion below of Ameritech's compliance with the competitive checklist.

¹⁷⁴ *See, e.g.*, ALTS Comments at 32-34; AT&T Comments at 41-42; Competition Policy Institute Comments at 10-12; MCI Comments at 48-49; Sprint Comments at 32-34; TCG Comments at 39-40.

¹⁷⁵ Section 271(d)(3)(C) requires the Commission to determine that "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). For a discussion of the Commission's inquiry under this provision, *see infra* Section IX.

¹⁷⁶ Ameritech Application at 9.

271(c)(1)(A), because these providers compete to serve only business customers.¹⁷⁷ These parties argue that section 271(c)(1)(A) requires that a BOC provide access and interconnection to its network facilities for the network facilities of one or more carriers, each of which serves both residential and business subscribers.¹⁷⁸ These parties further contend that the fact that MFS WorldCom and TCG are certified by the Michigan Commission to provide service to residential subscribers and have an effective local exchange tariff in place for the provision of residential and business services is not adequate to satisfy section 271(c)(1)(A).¹⁷⁹ They therefore contend that only Brooks Fiber is a "competing provider of telephone exchange services . . . to residential and business subscribers."¹⁸⁰

81. In response, Ameritech argues that "[n]othing in section 271(c)(1)(A) requires that residential and business customers be served by the *same* competitor."¹⁸¹ Ameritech further contends that the 1996 Act's goal of opening the local exchange and exchange access markets is achieved "whether there is (1) a single competitor serving both residential and business customers, or (2) two competitors, one serving business customers and the other residential customers."¹⁸² SBC and BellSouth agree with Ameritech, arguing that "Congress' goal of ensuring that facilities-based service is feasible for all types of subscribers is achieved just as effectively by multiple carriers as by one."¹⁸³

82. We conclude that, when a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each such carrier need not provide service to both residential

¹⁷⁷ ALTS Comments at 22-23; CompTel Comments at 28-29; Department of Justice Evaluation at 5-6; TRA Reply Comments at 13-14; MFS WorldCom Comments at 5; MFS WorldCom Reply Comments at 3. We note that, in its evaluation submitted with respect to SBC's application for authorization to provide in-region interLATA services in Oklahoma, the Department of Justice stated: "While each qualifying facilities-based provider need not be serving both types of customers if the BOC is relying on multiple providers, it necessarily follows that if the BOC is relying on a single provider it would have to be competing to serve both business and residential customers." Department of Justice SBC Oklahoma Evaluation at 9-10.

¹⁷⁸ Department of Justice Evaluation at 5-6; ALTS Comments at 22-23; CompTel Comments at 28-29; MFS WorldCom Comments at 5.

¹⁷⁹ Department of Justice Evaluation at 6 n.9; ALTS Comments at 22-23; CompTel Comments at 29.

¹⁸⁰ Department of Justice Evaluation at 6; ALTS Comments at 23; CompTel Comments at 29.

¹⁸¹ Ameritech Reply Comments at 2.

¹⁸² *Id.*

¹⁸³ BellSouth/SBC Comments at 2-3.

and business customers.¹⁸⁴ We conclude, for the reasons stated below, that this aspect of section 271(c)(1)(A) is met if multiple carriers collectively serve residential and business customers. We therefore find that Brooks Fiber, MFS WorldCom, and TCG collectively are "unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."

83. To interpret this part of section 271(c)(1)(A), we begin with the language of the statute. This section requires the BOC to establish that it has entered into "one or more binding agreements" under which it is providing access and interconnection for the facilities of "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."¹⁸⁵ The statutory language, read alone, can support either interpretation of the statute: (1) one or more competing providers must collectively serve residential and business subscribers; or (2) each individual competing carrier must provide service to both residential and business subscribers. In light of the legislative history and Congress' policy objective in the 1996 Act of promoting competition in all telecommunications markets, as discussed below, we conclude that the former is the better interpretation of the statute and will further to a greater extent Congress' objectives.

84. The Report that accompanied the bill that was reported out of the House Commerce Committee contains the only unambiguous indication in the legislative history of the Act that Congress intended to require that one competitor individually serve both residential and business subscribers. As reported by the House Commerce Committee, the bill required that there be "*an* unaffiliated competing provider of telephone exchange service . . . to residential and business subscribers."¹⁸⁶ The Committee Report explained that "the Commission must determine that there is "*a* facilities-based competitor that is providing service to residential and business subscribers."¹⁸⁷ This provision was amended on the floor of the House to require, as does the 1996 Act as enacted, that there be "*one or more* unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."¹⁸⁸ In our view, this amendment gave the BOCs greater flexibility in complying with section 271(c)(1)(A), by eliminating the requirement that one carrier serve both residential and business customers, and allowing instead, multiple carriers to serve such

¹⁸⁴ We note that, because Brooks Fiber serves both residential and business subscribers, we need not reach this issue to determine that Ameritech satisfies this aspect of section 271(c)(1)(A). Nevertheless, we address this issue to provide guidance for future section 271 applications.

¹⁸⁵ 47 U.S.C. § 271(c)(1)(A).

¹⁸⁶ House Report at 7.

¹⁸⁷ *Id.* at 76-77.

¹⁸⁸ The requirements in section 271(c)(1)(A) were taken "virtually verbatim from the House amendment." Joint Explanatory Statement at 147.

subscribers. In light of this legislative history, we find that our interpretation of this aspect of section 271(c)(1)(A) is more consistent with congressional intent than the approach advocated by ALTS, CompTel, and others.

85. Moreover, as a matter of policy, we believe that interpreting section 271(c)(1)(A) to allow one or more competing providers collectively to serve both residential and business subscribers more effectively promotes Congress' objective in the 1996 Act of opening the local exchange and exchange access markets to competition and promoting competition in those markets already open to competition, including the long-distance market.¹⁸⁹ Section 271 demonstrates that Congress intended to allow the BOCs into the in-region interLATA market upon their demonstration that their in-region local markets are open to competition and the other statutory requirements have been met. Interpreting section 271(c)(1)(A) to require competing carriers collectively to serve business and residential customers fulfills Congress' objective in section 271(c)(1)(A) by ensuring the presence of a competing provider for both residential and business subscribers.¹⁹⁰ We agree with Ameritech that requiring one carrier to serve both residential and business customers is not necessary to further Congress' objectives, because the local market would be as effectively open to competition whether one competitor is serving both residential and business subscribers, or multiple carriers are collectively serving both types of subscribers. Indeed, a requirement that each competitor individually serve both types of customers would raise the illogical possibility that there could exist several competing providers serving a large percentage of residential and business subscribers in a state, but the BOC would still not meet the requirements for in-region interLATA entry, simply because of business decisions made by competing providers with respect to which segments of the market to serve. For these reasons, we conclude that this requirement of section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers. We therefore find that Brooks Fiber, MFS WorldCom, and TCG collectively are "unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."

**4. Offer by Competing Providers of Telephone Exchange Service
Either Exclusively Over Their Own Telephone Exchange Service
Facilities or Predominantly Over Their Own Telephone Exchange
Service Facilities in Combination with Resale**

86. Section 271(c)(1)(A) further requires that competing providers offer telephone exchange service "either exclusively over their own telephone exchange service facilities or

¹⁸⁹ See *id.* at 1, 113.

¹⁹⁰ Because no party disputes that Brooks Fiber, MFS WorldCom, and TCG are providing at least some facilities-based service to both residential and business subscribers, we need not and do not reach the question of whether it is sufficient under section 271(c)(1)(A) for a competing provider to provide local service to residential subscribers via resale, as long as it provides facilities-based service to business subscribers.

predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."¹⁹¹ Ameritech claims that neither Brooks Fiber nor TCG offers any services through resale, and therefore, they each satisfy the requirements of section 271(c)(1)(A).¹⁹² Ameritech asserts that MFS WorldCom also meets the requirements of section 271(c)(1)(A), because its "resale of service of approximately 2145 non-Centrex lines is modest in comparison to the facilities-based service that MFS WorldCom provides."¹⁹³ In arguing that it satisfies this aspect of section 271(c)(1)(A), Ameritech notes that these competing providers all provide telephone exchange services to some customers through the use of unbundled network elements, in combination with facilities these carriers have constructed. Ameritech maintains that the term "own telephone exchange service facilities" includes the provision of service through the use of unbundled network elements.¹⁹⁴ Other parties, in response, contend that unbundled network elements obtained from a BOC are not a competing carrier's "own telephone exchange service facilities,"¹⁹⁵ and that under this interpretation, Brooks Fiber, MFS WorldCom, and TCG cannot be deemed to be exclusively or predominantly facilities-based.¹⁹⁶ Accordingly, we must first construe "own telephone exchange service facilities," and in particular, consider whether that phrase includes unbundled network elements obtained from Ameritech.

87. In support of its claim that unbundled network elements are a competing carrier's "own telephone exchange service facilities," Ameritech argues that section 271(c)(1)(A) juxtaposes two possible arrangements to provide telephone exchange service: (1) through a carrier's own telephone exchange service facilities; and (2) through resale.¹⁹⁷ As a

¹⁹¹ 47 U.S.C. § 271(c)(1)(A).

¹⁹² Ameritech Application at 12.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.* at 10-14; *cf.* Ameritech Reply Comments at 3 n.5 (arguing that the Commission need not reach this issue to determine that all three competing providers serve local customers either exclusively or predominantly over their own facilities).

¹⁹⁵ AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-7; Brooks Fiber Reply Comments at 4; MCI Comments at 6; MCI Reply Comments at 3-4; MCTA Comments at 17-18; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4; Sprint Comments at 7; Sprint Reply Comments at 5-8; TRA Comments at 20.

¹⁹⁶ ALTS Comments at 23-26; AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-8; Brooks Fiber Reply Comments at 4; MCI Comments at 6-8; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4-6; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 6-12; TCG Comments at 25; Time Warner Comments at 15-23; TRA Comments at 13-20; TRA Reply Comments at 9-14; MFS WorldCom Comments at 6-7; MFS WorldCom Reply Comments at 5-6.

¹⁹⁷ Ameritech Application at 12.

result, Ameritech contends that "facilities-based" encompasses all telephone exchange services other than resold services.¹⁹⁸ Thus, Ameritech argues that "own telephone exchange service facilities" includes both facilities to which a carrier has title and unbundled elements obtained from a BOC.¹⁹⁹ Ameritech further maintains that unbundled network elements are a carrier's own facilities because resellers do not have control over the facilities they use to provide service, whereas carriers have control over facilities they construct and over unbundled network elements they purchase.²⁰⁰ Ameritech further notes that, in the Commission's recent *Universal Service Order*, we interpreted a substantially similar term "~~own facilities~~," in section 214(e), to include unbundled network elements obtained from an incumbent LEC.²⁰¹ Ameritech argues that there is no reason to interpret differently the language in section 271(c)(1)(A).²⁰² Ameritech points out that, although we stated in the *Universal Service Order* that we were not interpreting "the language in section 271," we noted that "the 'own facilities' language in section 214(e)(1)(A) is very similar to language in section 271(c)(1)(A)."²⁰³

88. The Michigan Commission, BellSouth, and SBC support Ameritech's argument.²⁰⁴ BellSouth and SBC contend that not treating unbundled network elements as a competing provider's "own telephone exchange service facilities" would mean that, even if a BOC makes all items on the competitive checklist available to competing providers, that BOC may not be able to enter the in-region interLATA market, simply because competing providers choose to buy an unbundled network element from the BOC instead of constructing

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 13-14.

²⁰⁰ *Id.*

²⁰¹ Ameritech Application at 12-14. In the *Universal Service Order*, we determined that "a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) . . . satisfies the [own] facilities requirement of section 214(e)(1)(A)." *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, at para. 154 (rel. May 8, 1997) (*Universal Service Order*). Section 214(e)(1) provides that, in order to be eligible to receive universal service support, a telecommunications carrier must "offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities, or a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e)(1).

²⁰² Ameritech Application at 12-14; *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (applying "the normal rule of statutory construction that identical words in different parts of the same act are intended to have the same meaning") (citations omitted).

²⁰³ *Universal Service Order* at para. 168.

²⁰⁴ Michigan Commission Consultation at 11; BellSouth/SBC Comments at 3-4; *see also* SBC Reply Comments at 10-12.

a particular facility.²⁰⁵ BellSouth and SBC argue that Congress intended to treat unbundled network elements as a competing provider's own facilities in order to give the BOC the incentive to make all checklist items available and provide competing providers with the flexibility to choose whether to build a particular facility or purchase unbundled network elements from the BOC.²⁰⁶

89. Competing providers and other parties dispute these claims that the purchase of unbundled network elements from the BOC is sufficient to meet the section 271(c)(1)(A) "own telephone exchange service facilities" requirement.²⁰⁷ Several of these parties argue that the Commission need not define this term in section 271 in the same manner as it defined the term "own facilities" in section 214(e) in the *Universal Service Order*, because the two statutory provisions serve different purposes.²⁰⁸ Several parties argue that the language of section 271(c)(1)(A), which states that a BOC must provide "access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers" demonstrates that unbundled network elements are not the competitor's facilities, but the BOC's facilities.²⁰⁹ Furthermore, these parties contend that the "own telephone exchange service facilities" requirement in section 271 is intended to distinguish between the facilities constructed by a competing provider and the facilities that a BOC provides, because facilities obtained from the BOC are still subject to the BOC's control.²¹⁰ They argue that there can be meaningful competition only when a competing provider builds facilities through which it can offer unique services and provide consumers with genuine competitive choices.²¹¹ Thus, these

²⁰⁵ BellSouth/SBC Comments at 3-4.

²⁰⁶ *Id.*

²⁰⁷ ALTS Comments at 23-26; AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-8; Brooks Fiber Reply Comments at 4; MCI Comments at 6-8; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4-6; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 6-12; TCG Comments at 25; Time Warner Comments at 15-23; TRA Comments at 13-20; TRA Reply Comments at 9-14; MFS WorldCom Comments at 6-7; MFS WorldCom Reply Comments at 5-6.

²⁰⁸ ALTS Comments at 25 n.15; Brooks Fiber Comments at 7-8; MCI Comments at 8 n.13; NCTA Reply Comments at 6-8; Sprint Comments at 7-8; Time Warner Comments at 16-17, 21-22; TRA Comments at 15-17.

²⁰⁹ 47 U.S.C. § 271(c)(1)(A) (emphasis added); AT&T Comments at 34-36; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 10 n.20.

²¹⁰ ALTS Comments at 24-25; AT&T Comments at 36; Brooks Fiber Comments at 6; Brooks Fiber Reply Comments at 4; MCI Comments at 7; MCTA Comments at 17-18; NCTA Reply Comments at 5-6; Sprint Comments at 9-10; TCG Comments at 25; Time Warner Comments at 18-19; TRA Comments at 14-15; TRA Reply Comments at 9-10; MFS WorldCom Comments at 6; MFS WorldCom Reply Comments at 6.

²¹¹ Brooks Fiber Comments at 6; MCI Comments at 7; NCTA Reply Comments at 5; Ohio Consumers' Counsel Comments at 4-5; Sprint Comments at 10-12; Time Warner Comments at 18.